## APPENDIX B

## In the

## UNITED STATES COURT OF APPEALS

## FOR THE FIFTH CIRCUIT

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**No. 21977**

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JOHN EL STONE, *Appellant,*

*v.*

UNITED STATES OF AMERICA, *Appellee.*

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*Appeal from the United States District Court for the Northern District of Texas*

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(March 4, 1966.)

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Before JONES,* Senior Judge and GEWIN and BELL, Circuit Judges.

BELL, Circuit Judge: This appeal is from a judgment of conviction entered on six counts of an indictment after a

* Of the Court of Claims, sitting by designation.

trial by the court without a jury. Appellant waived jury trial. The indictment was in sixteen counts and was returned against appellant, James Woodrow Stone and Isadore Miller.

Count I charged appellant with violating 26 U.S.C.A., §7203 by accepting wagers during the period October 1, 1962 through June 30, 1963 without having paid the special occupational tax imposed by 26 U.S.C.A., §4411 and due under 26 U.S.C.A., §4901. He was sentenced to sixty days in prison and fined $1,000 on this count. He was placed on probation for three years and sentenced $1,000 each on convictions under Counts IV, VII, X, XV, and XVI, the sentences of probation to run concurrently. Count IV charged for the period October 1, 1961 through June 30, 1962. Counts VII and X charged him with violating 26 U.S.C.A., §7203 by accepting wagers during certain periods without having registered as required under 26 U.S.C.A., §4412. Count XV charged all three of the defendants with violating 18 U.S.C.A., §371, and §7203, supra, by conspiring to conduct a business of accepting wagers without first paying the special occupational tax. Count XVI charged them with violating §7203 by failing to make excise tax returns on taxes due under 26 U.S.C.A., §4401. Counts XIII and XIV were dismissed by the government, and the other counts related solely to James Woodrow Stone or Isadore Miller.

There are four assignments of error. Each of the counts in issue are said to be invalid in that the registration and special occupational tax statutes, 26 U.S.C.A., §§4411, 4412 and 4901 compel disclosures which would incriminate the

registrant in view of the criminal provisions of 18 U.S.C.A., §§1952, 1953 and 1084,[1] and the penal provisions of the State of Texas against gambling. Consequently, it is argued they are violative of appellant's constitutional privilege under the Fifth Amendment. It is urged that the District Court erred in overruling the motion for judgment of acquittal on this ground. The other three assignments question the sufficiency of the evidence.

The self incrimination argument as respects the penal provisions of the state law was put to rest by the Supreme Court in *United States v. Kahringer*, 1952, 345 U.S. 22, 73 S. St. 510, 97 L. Ed. 754. The constitutionality of the registration provision was upheld for the reason that the Fifth Amendment applies only to past conduct and the registration provision was construed as applying to future conduct. In *Lewis V. United States*, 1954, 348 U.S. 419, 75 S. Ct. 415, 99 L. Ed. 475, federal laws against gambling in the

[1] Section 1084 prohibits the transmission of bets or wagers by a wire communication facility in interstate or foreign commerce. Section 1952 prohibits travel in interstate or foreign commerce or the use of any facility therein, including the mail, for unlawful activity. Unlawful activity is described in §1952(b) as:

> "As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Section (a) requires the travel or use of the facility be with intent to distribute the proceeds of an unlawful activity, or to commit a crime of violence to further unlawful activity, or otherwise to promote or carry on any unlawful activity, and contains the requisite that one of these acts be thereafter accomplished or performance attempted.

Section 1953 makes it unlawful to sent or carry records, tickets, etc. used in betting or wagering in interstate or foreign commerce.

District of Columbia were said to give rise to the self incrimination claim but the Supreme Court followed the reasoning of *Kahringer* and again affirmed. These authorities are subsisting and binding on this court. But, appellant argues, 18 U.S.C.A., §§1952, 1953 and 1084, Footnote (1), supra, making specified interstate gambling activities unlawful, have been enacted in the interim and they render the reasoning of the Supreme Court in *Kahringer* and *Lewis* inapplicable.

The argument is that the registration, provision may serve a "link in a chain of evidence" to convict one of past interstate gambling activity under these statutes. The fallacy in this argument is that we do not have such a case. This prosecution is not brought under these interstate gambling activity statutes, and thus we are not presented with a question of evidence of registration and payment of the special occupational tax having been admitted to prove a charge of either prior or subsequent illegal conduct. Cf. *United States v. Zizzo*, 7 Cir., 1964, 338 F. 2d 577, cert. den., 381 U.S. 915, 14 L. Ed. 2d 435, where a registration and an occupational tax return were held admissible in a prosecution brought under 18 U.S.C.A., §1952. There the registration and return preceded the enactment of §1952.

The constitutionality of the registration and occupational tax provisions was upheld in the face of these new interstate gambling activity statutes in *United States v. Cefalu*, 7 Cir., 1964, 338 F. 2d 582, citing *United States v. Zizzo*, supra, as authority. This view was reaffirmed by the Seventh Circuit in *United States v. Altiere*, 7 Cir., 1964, 343 F. 2d

115, vacated by Supreme on other grounds, 34 L. W. 3242; and *United States v. Angelini*, 7 Cir., 1965, 346 F. 2d 278. See also *United States v. Costello*, 2 Cir., 1965, 352 F. 2d 848.

Appellant relies on *Albertson v. Subversive Activities Control Board*, .... U.S. ....., 86 S. Ct. ....., 15 L. Ed. 2d 165. There the selfincrimination which made the Fifth Amendment privilege applicable was based on past conduct. The Court said:

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act, 19 U.S.C. §2385 (1964 ed.), or under §4(a) of the Subversion Activities Control Act, 50 U.S.C., §783(a), (1964 ed.), to mention only two federal statutes * * * It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause."

The Court also concluded that Form IS-52 violated the Self-Incrimination Clause for the reason that the information called for in it "* * * might be used as evidence in or at least supply investigatory leads to a criminal prosecution." Registration by a Communist under either form would disclose past conduct subject to prosecution.

On the other hand, it is clear that the *Kahringer* and *Lewis* holdings as they relate to the Fifth Amendment are founded on a future conduct concept as distinguished from past conduct which is the basis for the privilege. A person

may or may not gamble after registering, according to his own volition. It must be admitted that the language in *Albertson* directed to Form IS-52 does bear rather closely on the problem presented in requiring gamblers to register and pay the special tax. Form IS-52 was a supplement to Form IS-52a and required the name of the Communist-action organization of which registrant was a member within the preceding twelve months, the name of the registrant, all other names used by registrant during the past ten years, date of birth, place of birth, residence and business address, offices held in the Communist-action organization, and a description of the duties and functions performed during the tenure of office. On balance however, we think it clear that this information which the Supreme Court described as being of the type that "* * * might be used as evidence in or at least supply investigatory leads to a criminal prosecution", applies to past conduct and for that reason falls in the category with Form IS-52a.

Thus, *Albertson* in no way impinges on the privilege against self-incrimination rulings of *Kahringer* and *Lewis* which are limited to future conduct situations. Our view that these cases were in no way disparaged by *Albertson* is buttressed by the fact that neither case is cited in *Albertson*. Being of this view, it follows that the District Court did not err in denying the motion to acquit on the constitutional ground.

Appellant further contends that the evidence was insufficient to show that he had knowledge of the duties imposed by the wagering tax statutes in question. In so do-

ing he seeks to show that the willfulness requirement of the statute has not been met. There was evidence from several persons that they placed bets with appellant over a course of time ranging from one to ten years. There was evidence that in 1961 appellant refused to accept a bet offered by telephone from the State of Missouri at which time he said that "* * * since they had passed this new law he didn't accept wagers over the state line". This established appellant's general familiarity with laws pertaining to gambling, and was a sufficient base for an inference beyond a reasonable doubt that appellant had knowledge of the duties imposed on him by the Wagering Tax stautes. *Edwards v. United States*, 5 Cir., 1964, 334 F. 2d 360.

The remaining contents of insufficiency of evidence to convict on Counts XV and XVI are without merit. The proof on these counts was ample.

AFFIRMED.

# APPENDIX C

FORM 11-C
Rev. July 1963

U.S. Treasury Department—Internal Revenue Service

## SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING.

(See Instructions on reverse for time and place for filing return)

**Return for period from** ..... **to June 30, 19**.....
(Month, day, and year)

**Check one:** ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

**For District Director's Use Only**

(Stamp number) .....

(Date issued) .....

(Registration number) .....

Tax ..... $.....
Penalty ..... $.....
Interest ..... $.....
Total ..... $

**1.** Name: True name .....

Alias, style, or trade name, if any .....

**2.** Address: Residence .....
(Number and street)

(City) (County) (State)

Business .....
(Number and street)

(City) (County) (State)

**3.** If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

**4.** If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

| True name | Title | Home address |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

**5.** Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

| Name of location | Street address | City and State |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

| True name | Special stamp No. in present use | Street address | City and State |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |

**6.** Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No (Check one)

If yes, give true name and address of each such person.

| True name | Street address | City and State |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

### SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

..... , 19.....
(Date)

.....
(Signature)

.....
(State whether individual owner, member of firm, or if corporation officer, give title)

## INSTRUCTIONS

1. **Who Must File.**—Every person who is liable for the 10-percent excise tax imposed by section 4401 of the Internal Revenue Code, and every person who is engaged in receiving wagers for or on behalf of any person so liable, is subject to a special tax of $50 per year imposed by section 4411 of the Code, and must file Form 11-C.

Section 4421 of the Code defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under sections 501 and 521 of the Code, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

2. **When To File.—(a) First and Renewal Returns and Applications for Registry**—Form 11-C serves two purposes: (A) A special tax return and (B) an application for registry. The first return and application for registry must be filed prior to engaging in the activity which results in liability for the special tax on wagering. Renewal returns and applications are required to be filed on or before July 1 of each year thereafter during which taxable activity continues. Changes in ownership which require a return and application for registry, and which result in special tax liability, include the following:

(1) Admission of new members to a firm or partnership.

(2) Formation of a corporation to continue the business of a partnership.

(3) Continuance of the corporate business by a stockholder after the corporation is dissolved.

**(b) Supplemental Applications for Registry.**—Change of place of business or residence address must be registered with the District Director of Internal Revenue by filing a Form 11-C and checking the block designated "Supplemental Return and Application," stating the new address and the date of change before (i) he engages in any wagering activity at the new address, or (ii) the termination of a 30-day period which begins on the day after the date of such change, whichever occurs first. Any other change must also be registered within 30 days after such change; examples of such other changes include the following: (1) Continuance of the operation of a business of a deceased person, who has paid the special tax, by the surviving spouse or child, or executor or administrator, or other legal representative, (2) Continuance of a business by a receiver or trustee in bankruptcy, (3) Continuance of a business by an assignee for the benefit of creditors, (4) Withdrawal from a firm or partnership of one or more members, and (5) Mere change of corporate name. Failure to comply with these requirements will result in additional tax and penalty. The taxpayer's special tax stamp shall accompany such supplemental application for proper notation by the District Director.

An individual accepting wagers on his own account shall register, by filing a Form 11-C designated "Supplemental Return" not later than 10 days after engaging a new agent or employee to receive wagers, the name, address, and number appearing on the special tax stamp of each such agent or employee. Likewise, an agent or employee receiving wagers on behalf of another shall register the name and address of each additional person by whom he is engaged to receive wagers within 10 days after he is so engaged.

3. **Where To File.**—The return must be filed with the District Director of Internal Revenue for the district in which is located the taxpayer's office or principal place of business or, if he has no office or principal place of business in the United States, with the District Director for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return must be filed with the District Director of Internal Revenue, Baltimore, Maryland, 21203.

4. **Computation of the Special Tax on Wagering.**—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July, the tax to be remitted is computed by multiplying the monthly rate of $4.16⅔ by the number of months remaining in the fiscal year. If the resulting amount involves a fraction, the full cent must be included. Example: If a person first commences business in November, liability should be computed as follows: $4.16⅔×8 (the number of months remaining in the fiscal year) equals $33.33⅓, or $33.34, the amount to be remitted.

5. **Penalties.**—If the return is not filed with the District Director prior to engagement in the activity which results in liability for the occupational tax on wagering, the penalty prescribed by sections 6651 and 6653 of the Internal Revenue Code may be incurred. In addition, under the provisions of section 7262 of the Code any person who does any act which makes him liable for the special tax, without having paid such tax, shall be fined not less than $1,000 and not more than $5,000. Section 7273 (b) provides that any person who fails to post or exhibit special wagering tax stamps in accordance with section 6806 (c) shall be liable to a penalty of $50 if failure to comply is due to negligence or $100 if due to willful neglect or refusal. For willful failure to file a return or pay the tax, the penalties under sections 7201 and 7203 may be imposed. Under the general provisions of section 1001 of Title 18 of the United States Code, whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

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